(2)

NO. 90-553

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BARBARA J. GOURAS (WADE),
Petitioner,

v.

BURROUGHS WELLCOME COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. DID THE FOURTH CIRCUIT ERR IN APPLYING THE STANDARD OF FIRESTONE TIRE & RUBBER CO. v. BRUCH TO REVIEW THE BURROUGHS WELLCOME BENEFITS COMMITTEE'S DECISION TO TERMINATE PETITIONER'S DISABILITY BENEFITS?

II. DID THE FOURTH CIRCUIT ERR IN FINDING THAT THE BURROUGHS WELLCOME BENEFITS COMMITTEE'S DECISION WAS REASONABLE AND PROPER WITHOUT CONSIDERATION OF VOCATIONAL EXPERT TESTIMONY WHEN NO SUCH EVIDENCE WAS PROFFERED TO THE COMMITTEE?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fourth Circuit are listed in the caption.

Respondent Burroughs Wellcome Co. is a wholly owned subsidiary of The Wellcome Foundation Ltd., whose shares are held by Wellcome plc, both of which are corporations organized under the laws of the United Kingdom.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

COUNTERSTATEMENT OF THE CASE[1/]

Burroughs Wellcome paid this Petitioner long term disability benefits based on her total disability rating from 1979 until 1985 when uncontroverted evidence demonstrated that she was no longer totally disabled and, could, in fact, perform sedentary work. Disregarding this change in disability

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1/ The Petitioner makes reference to the Joint Appendix filed with the Fourth Circuit. Petition at 4. Respondent understands that the Joint Appendix is not now before the Court as the Clerk of the Supreme Court has not requested the Clerk of the Fourth Circuit to certify and transmit the Joint Appendix from the proceedings below to the Clerk of this Court. See Supreme Court Rule 12.5. Respondent therefore refers only to the Appendix to the Petition, abbreviated as "P.A.," and the Appendix to Respondent's Brief in Opposition to the Petition, abbreviated as "R.A."

rating, Petitioner has insisted to Respondent and the courts below that she should have continued to receive benefits as if they were a lifetime entitlement. Both the Respondent and the courts below have rejected her unfounded position. Respondent respectfully submits that Petitioner's claim should end here with this Court's dismissal of the petition for writ of certiorari.

While Petitioner qualified for disability benefits from 1979 until 1983, a September 1984 physical examination by her medical doctor, Lee A. Whitehurst, M.D., revealed that Petitioner's disability rating changed in 1984. Dr. Whitehurst wrote in his office notes:

> I cannot find any objective reasons to preclude her from returning to work that does not require heavy lifting or prolonged bending or stooping, and possibly repetitive motions involving extension of the left arm . . . . Otherwise, I would recommend that she be given a

> permanent partial disability of 10%, if indeed, she has documentation that she sustained a left elbow injury on the job. I do not find any objective evidence on which to base a permanent partial disability for the spine.

(Emphasis added). (R.A. 1-2)

Dr. Whitehurst's 1984 medical report reflected his expert opinion that Petitioner was no longer totally disabled within the definition of the Burroughs Wellcome Long Term Disability Plan (the "Plan"), as she was capable of performing work requiring limited physical exertion. (R.A. 1-2).

One year later, Dr. Whitehurst examined Petitioner again. In his notes from the September 1985 examination, Dr. Whitehurst adopted and reiterated the findings he had made in his earlier notes:

> I would recommend that the recommendations given on the report of September 11, 1984 should be followed in regard to [Petitioner's] permanent partial disability . . . .

(R.A. 3). For the second time in a year, Dr. Whitehurst had found in his expert opinion that Petitioner was no longer totally disabled.

Following Dr. Whitehurst's September 1985 examination, the Plan's Benefits Committee reevaluated Petitioner's status under the LTD Plan. On October 10, 1985, the Chairman of the Benefits Committee and administrator of the Plan notified Petitioner by certified mail that "[b]ased upon medical examinations," her long term disability benefits had been terminated. (R.A. 4). He also informed Petitioner of her right to appeal the determination. (R.A. 4). Following receipt of the October 10 letter, Petitioner's counsel requested and obtained from the Benefits Committee additional information and documentation regarding the termination of Petitioner's benefits. (R.A.

10). On November 8, 1985, Petitioner appealed the decision to the Benefits Committee.

In a November 21, 1985 letter written in response to Petitioner's notice of appeal, the LTD Plan administrator informed Petitioner that as part of the process of reviewing Petitioner's appeal, the Committee was requesting further medical evaluation "regarding [Petitioner's] ability to perform gainful employment." (R.A. 5). The plan administrator also encouraged Petitioner, through her counsel, to submit any additional information she wished the Committee to consider. Id. Neither Petitioner nor her counsel ever submitted any evidence to support her claim.

Pursuant to the request of the Benefits Committee, Paul Burroughs, M.D., of the Bone and Joint Clinic in Raleigh, North Carolina,

rendered an expert medical opinion concerning Petitioner's disability based on a physical examination and interview with Petitioner on December 10, 1985, and review of her medical records provided by Respondent. Dr. Burroughs concluded in his medical report:

> No specific reasons for complete disability rating is noted in the records from Burroughs Wellcome. On the basis of this examination, a 10% disability status of the elbow, as well as perhaps 5 to 10% disability of the back could be justified. I do not believe the patient will be able to do any heavy work due to these factors but should be able to do sedentary work on the basis of information available to me.

(R.A. 7-8) (emphasis added).

On January 16, 1986, the plan administrator advised Petitioner and her attorney of the Benefits Committee's final determination that Petitioner was not totally disabled under the Plan. (R.A. 9). Subsequently, the plan

administrator provided Petitioner's attorney with a copy of Dr. Burroughs' medical evaluation and explained the reasons for the Committee's decision:

> As you recollect, in response to Ms. Wade's appeal of the initial denial of continued Plan benefits, the Benefits Committee sought an additional medical evaluation to determine whether Ms. Wade continued to remain totally disabled within the definition of total disability under the plan. Dr. Burroughs [sic] conclusion was that Ms. Wade 'should be able to do sedentary work . . .' To remain eligible for plan benefits, Ms. Wade must be unable to engage in any substantial gainful employment as a result of her disability. The Committee also offered to consider any additional evidence Ms. Wade might wish to offer, but received no further submissions from or on behalf of Ms. Wade.

(R.A. 10-11).

The Burroughs Wellcome LTD Plan grants exclusive discretion to the Benefits Committee to determine a participant's right to benefits based on evidence which the

Committee deems necessary or desirable. The Plan provides in relevant part:

> Total Disability . . . The determination of whether or not a participant is totally disabled shall be made by the Committee, based upon such evidence as the Committee deems necessary or desirable.

(P.A. 28) (emphasis added). The Plan further vests the Committee with the sole discretion to interpret and apply the Plan's terms and provides that the Committee's decisions in this regard "shall be binding and conclusive upon all participants." (P.A. 31). Finally, the Plan provides that following the denial of benefits to a participant, where the Committee has given the participant proper notice and an opportunity for review, the Committee's final determination upon review shall be "binding and conclusive." (P.A. 31-32).

I. THE FOURTH CIRCUIT'S DECISION CORRECTLY APPLIED BRUCH AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

A. The Fourth Circuit Opinion Applying Bruch Does Not Conflict With The Eighth Circuit Opinion In Gunderson Which Did Not Apply Bruch.

Petitioner asks this Court to grant certiorari because of a purported conflict between the Fourth Circuit's opinion in this case and the Eighth Circuit's opinion in Gunderson v. W. R. Grace & Company Long-Term Disability Income Plan, 874 F.2d 496 (8th Cir. 1989).[2/] There is no conflict.

[2/] Petitioner also cites one District Court opinion, Jenkinson v. Chevron Corp., 634 F. Supp 375 (N.D. Cal. 1986). Inasmuch (Continued)

As Petitioner concedes, in this case the Fourth Circuit properly applied the analysis mandated by this Court in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948 (1989) (P.A. 7-8) and found that "[the Burroughs Wellcome] Plan clearly vested in the Benefits Committee the discretion to determine 'total disability' and, thus, eligibility for [long term disability] benefits." (P.A. at 8). The Court of Appeals then applied the "abuse of discretion" standard to examine the Committee's decision, as required by Bruch. 489 U.S. at ____, 109 S.Ct. at 954.[3/]

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as Jenkinson has not been cited, favorably or otherwise, by the Ninth Circuit, it does not represent the Ninth Circuit's view.

3/ In those plans vesting discretionary authority in the plan administrator, Bruch (Continued)

In contrast, Gunderson was not decided under Bruch, as it was briefed and argued prior to the decision in Bruch, and the Eighth Circuit appears to have applied a more rigorous de novo standard in reviewing the administrator's decision rather than an abuse of discretion standard. Gunderson 874 F.2d at 498-99, n.3, and 500. The two opinions cannot conflict when they reach different conclusions applying different standards of review.

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teaches that the deferential abuse of discretion standard applies unless the administrator is biased or otherwise interested in the decision. See Bruch, 489 U.S. at ___, 109 S.Ct. at 956-57. Petitioner has not alleged or suggested any such bias on the part of the Burroughs Wellcome Benefits Committee.

Bruch teaches that the standard of review must be determined by an analysis of plan language. If the plan grants discretionary authority to the decision-maker, the deferential abuse of discretion standard applies. If there is no express grant of authority, de novo review is in order. The evidence before the decision maker only comes into play after the reviewing body has decided which standard of review should apply in order to determine whether the standard has been satisfied.

Following Bruch, the Fourth Circuit in the instant case based its determination on the following language in the Plan:

> The determination of whether or not a participant is totally disabled shall be made by the Committee, based upon such evidence as the Committee deems necessary or desirable.

The Fourth Circuit found no abuse of discretion as there was sufficient evidence

from which the Committee could conclude that Petitioner was not totally disabled. The record showed that the Committee had before it and relied upon the reports of three examinations by two physicians over a period of fourteen months between 1984 and 1985, all of which determined that Petitioner suffered from at worst a 5% to 10% disability and would be able to perform sedentary work. (P.A. 9, R.A. 2,3,7-8). Petitioner never presented any evidence to the Committee to refute or contradict these expert opinions. (R.A. 9). Thus, the Court of Appeals found that the Committee could reasonably conclude that Petitioner was no longer "totally disabled" under the Plan's definition. (P.A. 9).

Contrary to Bruch, the Gunderson court failed to select its standard of review on the basis of whether the plan in question

granted discretion to the plan administrator, as required by Bruch. It did not analyze the provisions of the W. R. Grace plan to determine whether the plan administrator had the discretionary power to make eligibility determinations. Since Gunderson lacks this crucial analysis, it is clear that Gunderson does not follow Bruch. Moreover, the footnoted reference to possible applicability of an "arbitrary and capricious" standard, which this Court rejected in Bruch, reflects the Eighth Circuit's misunderstanding of the Bruch holding. 874 F.2d at 498-99, n.3.

In Gunderson, the Eighth Circuit applying what was, in essence, a de novo standard of review, looked first to the evidence before the plan administrator, and then refused to defer to the administrator's decision to terminate benefits. Id. at 500. The plan administrator in that case awarded long-term

disability benefits at first, but subsequently attempted to terminate those benefits without receiving any new evidence of changed disability status to support the termination. Id. at 499-500. The Gunderson court observed: "we don't believe such deference encompasses the Plan's decision to use the same evidence which once supported its finding of disability to now support a finding . . . of no disability." Id. at 500. Not surprisingly, using different reasoning, the Gunderson Court reached a result different from the Fourth Circuit which applied a Bruch analysis.

Another Fourth Circuit decision contrasts with Gunderson, which was decided by a District Court Judge sitting by designation without benefit of briefing or argument concerning Bruch. de Nobel v. Vitro Corp., 885 F.2d 1181 (4th Cir. 1989), is a case

where a Court of Appeals requested supplemental briefing after Bruch was decided to properly consider its implications. Id. at 1185, n.3. The Gunderson court's failure to request additional briefing or argument for the purpose of further considering Bruch is additional proof that Gunderson is, in essence, a pre-Bruch case. Thus, there is no conflict between Gunderson and the Fourth Circuit opinion here, in which the Fourth Circuit carefully and correctly followed Bruch.

B. This Case Does Not Conflict With Gunderson Because Of Significant and Material Factual Distinctions.

The Gunderson opinion is based on the facts and specific plan provisions in that case, which differ significantly from the facts and material provisions of the Burroughs Wellcome Plan. The Gunderson plan administrator terminated the claimant's

benefits without any change in expert medical opinion regarding the extent of claimant's disability. In sharp contrast with the facts of Gunderson, the Burroughs Wellcome Benefits Committee obtained additional evidence of changed disability rating before reaching its decision to terminate Petitioner's benefits. As part of the decision-making process, the Committee arranged for a follow-up physical examination of Petitioner. (R.A. 5). In addition, the Benefits Committee invited evidence from the Petitioner, but Petitioner failed to offer one iota of support for her claim of total disability. (R.A. 5, 10). Thus, unlike Gunderson, where the plan administrator terminated benefits without obtaining any additional evidence of changed disability rating, the Benefits Committee of the Burroughs Wellcome Plan relied on ample

additional evidence from two different physicians before it rendered its final decision terminating Petitioner's benefits.

Significant differences between the provisions of the W. R. Grace Plan applied in Gunderson and the Burroughs Wellcome Plan also distinguish the two cases. Here, the Fourth Circuit properly concluded that the Burroughs Wellcome Plan clearly gives the Benefits Committee discretion to make benefits eligibility decisions. In contrast, the Gunderson court makes no mention of any such discretionary provisions in the W. R. Grace Plan. Furthermore, the Gunderson plan specifically referred to the employee's ability to perform "any occupation" as a factor to be considered in making eligibility decisions. The Gunderson court explicitly relied upon the "any occupation" language to hold that the administrators of the Gunderson

plan should have obtained a vocational expert's opinion as part of the decision making process. Id. at 499. In contrast, the Burroughs Wellcome Plan contains no comparable language concerning the Petitioner's ability to perform "any occupation." Thus, the plan language which supported the Gunderson holding concerning vocational expert testimony is totally absent from the Plan at issue in this case.

C. The Eighth Circuit Does Not Require Consideration Of Vocational Evidence In All Cases.

Contrary to Petitioner's assertion, this case does not conflict with the Eighth Circuit's views on vocational expert testimony in ERISA welfare benefit plans. Notwithstanding Gunderson, the Eighth Circuit does not require consideration of vocational expert testimony in all cases of denials of benefits under ERISA plans. In Potter v.

Conn. General Life Ins. Co., 901 F.2d 685, 686 (8th Cir. 1990), the court affirmed a denial of such disability benefits. There the Eighth Circuit rejected the claimant's argument that failure to consider vocational expert testimony was grounds for reversal. Id. at 686.

D. The Fourth Circuit's Opinion In This Case Is In Harmony With All Other Circuits' Application Of Bruch.

Since Bruch, federal appellate courts, including the Eighth Circuit, have carefully examined the provisions of each plan to determine whether it vests its administrator with discretionary powers. Where the plan contains such grants of discretionary authority, the appellate courts uniformly reject the de novo standard of review, as Bruch requires; in the absence of discretionary powers, de novo review is the rule. Consequently, the Fourth Circuit

opinion is in complete harmony with the post-Bruch decisions of the other Courts of Appeal. See Potter v. Conn. General Life Ins. Co., 901 F.2d 685, 686 (8th Cir. 1990); Exborn v. Central States Health and Welfare Fund, 900 F.2d 1138, 1141 (7th Cir. 1990); Perry v. Simplicity Engineering, 900 F.2d 963, 965 (6th Cir. 1990); Egert v. Conn. General Life Ins. Co., 900 F.2d 1032, 1035 (7th Cir. 1990); Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 119 (3d Cir. 1990); Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689, 694 (6th Cir. 1990); de Nobel v. Vitro Corp., 885 F.2d 1181, 1186 (4th Cir. 1989); Bali v. Blue Cross and Blue Shield Ass'n, 873 F.2d 1043, 1047 (7th Cir. 1989).

E. The Fourth Circuit's Unpublished Opinion Is Not Binding Precedent Even In The Fourth Circuit And Consequently Poses No Conflict With Any Other Court Of Appeals Decision.

The Court of Appeals' decision in this case is an unpublished opinion which is not binding precedent in the Fourth Circuit.[4/]

[4/] The cover page of the Fourth Circuit's opinion states: "Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6." (P.A. 1). I.O.P. 36.6 provides:

> Citation of Unpublished Dispositions. In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
>
> If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the

(Continued)

(P.A. 1). Fourth Circuit I.O.P. 36.6 provides that the Fourth Circuit will not cite an unpublished disposition in any of its published opinions or unpublished dispositions, absent "unusual circumstances." Since the Fourth Circuit's opinion is not even binding precedent in that circuit, it can present no conflict with any opinion of any other federal court of appeal. See Taylor v. United States, ___ U.S. ___, 110 S.Ct. 265 (1989) (Justice Stevens observed the rule that because an unpublished court of appeals opinion lacks

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Court. Such service may be accomplished by including a copy of the disposition in the appendix to the brief. (emphasis added).

"precedential value," there is no "inter-Circuit conflict" and consequently no reason to grant a petition for certiorari.)

II. THE PETITION SHOULD BE DISMISSED BECAUSE IT DOES NOT PRESENT ANY ISSUES OF GENERAL OR NATIONAL SIGNIFICANCE.

A. Because Of The Unique Contractual Provisions Of The Benefit Plans, This Case Lacks National Significance And Is Inappropriate For Review By Certiorari.

This case involves nothing more than the interpretation of the contractual language of the Burroughs Wellcome Plan. It does not concern the interpretation of any provision of the Employee Retirement Income Security Act of 1974 ("ERISA"),[5/] or any other federal

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5/ 29 U.S.C. § 1001 et seq.

statute. The Fourth Circuit opinion correctly observed that

> the threshold question in this case [. . .] is a matter of contract interpretation: has the plan given the Benefits Committee discretion "to determine eligibility for benefits or to construe terms of the plan?"

(citation omitted). (P.A. 8). Inasmuch as the terms of the Burroughs Wellcome Plan are unique to that plan, this case presents no issues of national importance, since the interpretation of the language would be unique to this plan and would have little application to other plans throughout the country.

B. The Fourth Circuit Correctly Rejected Petitioner's Position That The Benefits Committee Should Be Required to Consider Vocational Expert Testimony.

1. Consistent With The Plan's Grant of Discretionary Authority, The Benefits Committee Reasonably Chose To Rely On The Medical Evidence Available To It.

As required by Bruch, the Fourth Circuit correctly found that the Plan expressly vested the Benefits Committee with broad discretion to make benefits determinations. (P.A. 8). The Plan also vests the Committee with the discretion to determine what evidence is necessary or desirable in making disability determinations. The Plan provides that the Committee's determinations are to be

> . . . based upon such evidence as the Committee deems necessary or desirable. The Committee may require one or more physical examinations of the Participant by a physician selected or approved by the Committee to determine the commencement or continuation of total disability.

(R.A. 28-29). (emphasis added). Bruch teaches that the Committee's determination regarding evidence should not be disturbed so long as it is reasonable. See id., 489 U.S. at ____, 109 S.Ct. at 954.

It follows that the Fourth Circuit

correctly deferred to the Committee's discretion in deciding what evidence was "necessary and desirable" to consider in determining whether to continue Petitioner's long term disability benefits. The Committee's reliance on expert medical evidence here was clearly reasonable. The Committee relied on three different examinations by two different physicians over a fourteen month period. Petitioner never presented any evidence of any sort to support her position despite numerous opportunities to do so. The uncontraverted medical evidence established that Petitioner was not totally disabled but was capable of performing sedentary work. The Committee did not abuse its discretion in this case.

2. Petitioner's Contention That Social Security Law Must Be Incorporated Into The Plan Is Unsound And Unfounded.

Petitioner's assertion that the case law

interpreting certain provisions in the Social Security Act[6/] must be applied in reviewing the Benefits Committee's decision is unsound. Petitioner cites not one case in which a court has held that social security law must be applied in interpreting an ERISA plan. In fact, the Courts of Appeals have not, typically, employed Social Security Act analysis to the interpretation of an ERISA plan. Bali v. Blue Cross & Blue Shield Ass'n, 873 F.2d 1043 (7th Cir. 1989); de Nobel v. Vitro Corp., 885 F.2d 1181 (4th Cir. 1989). It makes no sense to do so.

The burden of proof on the Secretary of

6/ Title 42 U.S.C. §§ 423(d)(1)-(2)(A),(3).

Health and Human Services in a social security benefits case differs dramatically from that of a plan administrator in determining eligibility under an ERISA benefits plan. Social security benefits are provided by the federal government with burdens of proof concerning eligibility dictated in large part by public policy and constitutional concerns not applicable to private contractual relationships. In contrast to the exclusive discretion often vested in an ERISA plan administrator, as typified by the Burroughs Wellcome Plan, once a social security claimant has established a prima facie case of disability, "the burden of going forward and proving that the claimant can perform an alternate job which exists in the national economy shifts to the Secretary." Smith v. Califano, 592 F.2d 1235, 1236 (4th Cir. 1979), citing, Taylor v.

Weinberger, 512 F.2d 664 (4th Cir. 1975). The Secretary of Health and Human Services thus bears an affirmative duty to show that the claimant can perform a particular job and that the job actually exists. The specificity of this showing often necessitates the consideration of vocational evidence. 592 F.2d at 1236.

In contrast to the proof burdens in social security disability cases, private parties may allocate burdens as they wish. The provisions of the Burroughs Wellcome Plan place no affirmative duty on the Benefits Committee to prove Petitioner's ability to perform an alternate job, or that any such job exists. To adopt Petitioner's contention would effectively reverse the Plan's provisions which implicitly contemplate that the burden is not on the plan administrator, but rather on the benefits claimant to come

forward to rebut evidence which established a change in disability status. Contrary to the provisions of the Burroughs Wellcome LTD Plan, Petitioner's position would require the Committee to prove the existence of work in the national economy which Petitioner could perform. Such an interpretation is not in keeping with the respect due the contractual provisions of this Plan.[7] See Bruch, 489 U.S. at ____, 109 S.Ct. at 955; Shaw v. Delta Airlines, Inc., 463 U.S. 85, 90 103 S.Ct. 2890, 2896 (1983) (recognizing contractual nature of ERISA plans).

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[7] As stated in Bruch, ERISA was enacted to "'protect contractually defined benefits.'" (citations omitted).

3. Even If Social Security Law Were Applied Here, Petitioner Failed To Introduce Any Evidence Of Disability Whatsoever, Thereby Failing To Shift To The Committee The Burden Of Proving That Petitioner Can Perform Work In The National Economy.

Even assuming that law interpreting the Social Security Act should apply here, the Fourth Circuit committed no error in finding that the Benefits Committee need not consider vocational expert testimony, since Petitioner failed to introduce evidence which would shift that burden to the Benefits Committee. As indicated above, under applicable law interpreting the Social Security Act, the initial burden of proving disability rests upon the claimant, after which the burden shifts to the Secretary of the Social Security Administration to prove affirmatively that the claimant can perform an alternate job which exists in the national

economy. Smith v. Califano, 592 F.2d 1235, 1236 (4th Cir. 1979).

Here, when notified of the change in her disability status, Petitioner offered no evidence, whether vocational, medical, or otherwise, supporting her claim of total disability to rebut the expert medical evidence which uniformly demonstrated that Petitioner had, at most, a five (5) to ten (10) percent disability rating. Thus, even applying the law applicable to the Social Security Act, Petitioner failed to shift to the Benefits Committee the burden of going forward with vocational evidence. Since Petitioner failed to shift this burden, under Social Security disability analysis the Committee would never have become obligated to introduce evidence proving the existence of jobs which Petitioner was capable of performing, or to consider vocational

evidence in connection with that proof.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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EXCERPTS FROM OFFICE NOTES OF LEE A. WHITEHURST, M.D., FOLLOWING SEPTEMBER 11, 1984 EXAMINATION OF PETITIONER

SOCIAL HISTORY

She has been working for Burroughs Wellcome for 5 months.

. . .

She was seen on 8/4/80 by this examiner. At that time, she expressed a strong desire to go back to work. I felt at that time it would be satisfactory. I did not feel that her condition would be made worse by her working.

. . .

RECOMMENDATIONS

. . .

I cannot find any objective reasons to preclude her from returning to work that does not require heavy lifting or prolonged bending or stooping, and possibly repetitive motions involving extension of the left

arm. These activities may cause increased discomfort. Otherwise, I would recommend that she be given a permanent partial disability of 10%, if indeed, she has documentation that she sustained a left elbow injury on the job. I do not find any objective evidence on which to base a permanent partial disability for the spine.

EXCERPT FROM OFFICE NOTES OF LEE A WHITEHURST, M.D., FOLLOWING SEPTEMBER 16, 1985 EXAMINATION OF PETITIONER

RECOMMENDATIONS:

If her symptoms warrant, I would recommend that she have exploration of the elbow. . . . . She will think about her options of treatment and we may proceed accordingly. She was extensively counselled. I would recommend that the recommendations given on the report of September 11, 1984 should be following in regard to her permanent partial disability, if she does not feel that her symptoms warrant surgical intervention.

COMPLETE TEXT OF OCTOBER 10, 1985 LETTER FROM BURROUGHS WELLCOME LONG TERM DISABILITY PLAN ADMINISTRATOR KENNETH W. KIDD TO PETITIONER MRS. BARBARA J. WADE.

October 10, 1985

Mrs. Barbara J. Wade
Route 7, Box 458
Greenville, NC 27834

Dear Mrs. Wade:

Based on medical examinations, I must determine that you are no longer totally disabled under the rules of the Long-Term Disability Plan of Burroughs Wellcome Co. Therefore, any benefits you were receiving under this Plan are terminated.

You have the right to appeal this decision to the Benefits Committee. Your appeal must be in writing and dated no later than 30 days from the date of this letter.

Very truly yours,

Kenneth W. Kidd
Chairman, Benefits Committee

COMPLETE TEXT OF NOVEMBER 21, 1985 LETTER FROM BURROUGHS WELLCOME LONG TERM DISABILITY PLAN ADMINISTRATOR KENNETH W. KIDD TO PETITIONER'S ATTORNEY WILLIS A. TALTON, ESQ.

November 21, 1985

Mr. Willis A. Talton
Attorney at Law
P. O. Box 390
216 South Washington Street
Greenville, North Carolina 27834

Re: Barbara J. Wade

Dear Mr. Talton:

At it's [sic] regularly scheduled meeting on November 19, 1985, the Benefits Committee reviewed Ms. Wade's appeal of the termination of her benefits under the Long-Term Disability Plan of Burroughs Wellcome Co.

After reviewing the various medical reports on Ms. Wade, the Committee has asked for further medical evaluation regarding Ms. Wade's ability to perform gainful employment.

We are in the process of setting up an appointment for Ms. Wade to have another medical evaluation performed by an outside physician. You and Ms. Wade will be notified regarding this evaluation.

If there is any additional information you wish to submit regarding Ms. Wade, please do so. The next meeting of the Benefits

Committee is scheduled for Tuesday, December 17, 1985.

Very truly yours,

S/Kenneth W. Kidd
Plan Administrator

cc: Ms. Barbara Wade

EXCERPT OF MEDICAL REPORT OF PAUL BURROUGHS, M.D. CONCERNING PHYSICAL EXAMINATION OF PETITIONER ON DECEMBER 10, 1985

This 45 year old female is referred by Burroughs Welcome (sic) Company for disability evaluation. Patient is seen without benefit of any medical records and this has been ordered and will be hopefully received in the near future. All information is obtained from the patient.

. . .

1-9-86 ADDENDUM: Burroughs-Welcome (sic) sent over the medical records from Ms. Briley which date to 1979. Examinations by Dr. Whitehurst and Dr. Crisp were present as well as by Dr. Bill Fore.

No specific reasons for a complete disability rating is noted in the records from Burroughs Wellcome. On the basis of this examination, a 10% disability status of the elbow, as well as perhaps 5% to 10%

disability of the back could be justified. I do not believe the patient will be able to do any heavy working due to these factors but should be able to do sedentary work on the basis of information available to me.

COMPLETE TEXT OF JANUARY 16, 1986 LETTER FROM BURROUGHS WELLCOME LONG TERM DISABILITY PLAN ADMINISTRATOR KENNETH W. KIDD TO PETITIONER'S ATTORNEY WILLIS A. TALTON, ESQ.

January 16, 1986

Mr. Willis A. Talton
Attorney at Law
P.O. Box 390
216 S. Wilmington Street
Greenville, NC 27834

Re: Barbara J. Wade

Dear Mr. Talton:

The Benefits Committee met on Wednesday, January 15, 1986 to review Dr. Burroughs medical evaluation of Mrs. Wade.

The Committee has determined that she is not totally disabled under the rules of the Long-term Disability Plan of Burroughs Wellcome Co.

Very truly yours

Kenneth W. Kidd
Plan Administrator

cc: Mrs. Barbara J. Wade

COMPLETE TEXT OF FEBRUARY 14, 1986 LETTER FROM BURROUGHS WELLCOME LONG TERM DISABILITY PLAN ADMINISTRATOR KENNETH W. KIDD TO PETITIONER'S ATTORNEY WILLIS A. TALTON, ESQ.

February 14, 1986

Mr. Willis A. Talton
Attorney at Law
P.O. Box 390
216 S. Wilmington Street
Greenville, NC 27834

Re: Long-Term Disability Claim
Barbara J. Wade

Dear Mr. Talton:

Pursuant to your letter dated February 6, 1986, I am including a copy of the medical evaluation of Barbara J. Wade submitted to the Benefits Committee by Dr. Paul Burroughs after his examination of Ms. Wade. I also include a copy of the Long-Term Disability Plan (the Plan) you requested from the Benefits Office in our Greenville plant.

As you recollect, in response to Ms. Wade's appeal of the initial denial of continued Plan benefits, the Benefits Committee sought an additional medical evaluation to determine whether Ms. Wade continued to remain totally disabled within the definition of total disability under the Plan. Dr. Burroughs conclusion was that Ms. Wade "should be able to do sedentary work. . ." To remain eligible for Plan benefits, Ms. Wade must be unable to engage in any substantial gainful employment as a result of her disability.

The Committee also offered to consider any additional evidence Ms. Wade might wish to offer, but received no further submissions from or on behalf of Ms. Wade.

The Plan provides for a determination and an appeal from that determination. In this case, there was a determination and an appeal. On appeal, the Committee reviewed the medical evaluations, including Dr. Burroughs evaluation, and in light of the evidence, determined that Ms. Wade was ineligible for benefits. Any action that Ms. Wade might choose to take in this case does not seem to depend upon any further action by the Benefits Administrator, the Benefits Committee or the Company.

If you have any further questions, please feel free to write me.

Very truly yours

S/Kenneth W. Kidd
Administrator of the Benefits Committee